Shapadu Energy Engineering Sdn Bhd v Suasa Unik (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO D1–22–1345 OF 1999
MOHD GHAZALI J
4 APRIL 2001

Civil Procedure *— Stay of proceedings — Arbitration clause — Discreton of court to grant stay of proceedings — Whether exist dispute or difference as to payment of outstanding sum of works done — Arbitration Act 1952 s 6*

The defendant had appointed the plaintiff as the main contractor to carry out mechanical and electrical works, the fixing of fire protection system and certain 'variation order' works for a proposed ductile iron pipe factory, upon the terms and conditions set out therein ('the works'). It was the plaintiff's claim that the works had been carried out and that upon the completion of the works a 'certificate of practical completion' had been issued but notwithstanding that, the defendant has yet to pay the plaintiff the balance outstanding for work done and the return of retention sum which has been retained by the defendant pursuant to the terms and conditions of the contract ('the outstanding sum'). Despite letters of demand and reminders, the defendant had refused or failed to make payment. The plaintiff later filed an action claiming the outstanding sum. The defendant with leave of the court entered conditional appearance and filed an application praying for, inter alia, the proceedings to be stayed pursuant to s 6 of the Arbitration Act 1952 ('the Act'). In its affidavit in support of the application, the defendant pointed out that cl 39 of the contract entitled 'Arbitration' provides that in event that any dispute or difference should arise between the employer, ie the defendant or the engineer and the contractor, ie the plaintiff either during the progress or after the termination or abandonment of the works, as to any matter or things of whatsoever nature arising thereunder or in connection therewith, then such dispute or difference shall be referred to the engineer for a decision. The learned senior assistant registrar dismissed the defendant's application and against that decision the defendant appealed.

Held, dismissing the appeal:

(1) The court has a discretion whether to grant a stay of proceedings and refer the matter to arbitration. In other word, in an application of this nature, the court has the ultimate discretion to determine whether to stay the proceedings or to proceed to dispose the action. In the instant case, the learned senior assistant registrar has determined that such a discretion should be exercised in favour of the plaintiff, viz, she dismissed the defendant's application for a stay of the proceedings and the court finds nothing erroneous about her exercise of that discretion (see p 526E–F).

(2) In the instant case, there were sufficient reasons for refusing stay. The defendant had not even disputed that the 'certificate of practical completion' had been issued erroneously. Further, the defendant did not seem to have exercised its rights to arbitration under cl 39 of the contract when the demand for the outstanding sum owing was made neither have they shown that they had ever responded to the letters of demand sent by solicitors acting for the plaintiff. Further no dispute seem to exist prior to the filing of the suit by the plaintiff. The defendant's application was totally without any merits. Their allegations of the existance of disputes or difference as stated in their affidavit were bare averments. The defendant had not shown the existance of any prima facie dispute or difference that has arisen under or in connection to the works which would fall within the purview of the said cl 39 and hence would invoke the operation of s 6 of the Act (see p 527B–D); *Teknik Cekap Sdn Bhd v Nirwana Indah Sdn Bhd* [1996] 4 MLJ 154 followed.

[Bahasa Malaysia summary

Defendan telah melantik plaintif sebagai kontraktor utama bagi menjalankan kerja-kerja mekanik dan elektrik, memasang sistem perlindungan kebakaran dan kerja-kerja 'pelbagai arahan' tertentu untuk satu cadangan kilang paip besi mulur, berdasarkan terma-terma dan syarat-syarat yang dinyatakan berikutnya ('kerja-kerja tersebut'). Adalah tuntutan plaintif bahawa kerja-kerja tersebut telah dijalankan dan bahawa setelah selesai kerja-kerja tersebut satu 'sijil lengkap praktikal' telah dikeluarkan tetapi meskipun begitu, defendan masih belum membayar plaintif baki yang terhutang untuk kerja yang telah dilakukan dan pemulangan jumlah simpanan yang telah disimpan oleh defendan menurut terma-terma dan syarat-syarat kontrak ('jumlah terhutang tersebut'). Walaupun dihantar surat-surat tuntutan dan peringatan, defendan telah enggan dan gagal untuk membuat pembayaran. Plaintif kemudiannya telah memfailkan satu tindakan menuntut jumlah terhutang tersebut. Defendan dengan kebenaran mahkamah telah memasuki satu kehadiran bersyarat dan memfailkan satu permohonan memohon, antara lain, prosiding digantungkan menurut s 6 Akta Timbangtara 1952 (Akta tersebut'). Di dalam afidavit menyokong permohonannya, defendan telah mengutarakan bahawa kl 39 kontrak bertajuk 'Timbangtara' memperuntukkan bahawa dalam keadaan di mana apa-apa pertikaian atau perbezaan telah timbul antara majikan, iaitu defendan atau jurutera dan kontraktor, iaitu plaintif sama ada semasa kerja-kerja sedang dijalankan atau selepas penamatan atau peninggalan kerja-kerja tersebut, tentang apa-apa perkara atau benda apa sekalipun sifatnya yang timbul daripadanya hendaklah dirujukkan kepada jurutera tersebut untuk satu keputusan. Penolong kanan pendaftar yang arif menolak permohonan defendan dan dengan keputusan tersebut defendan telah membuat rayuan.

Diputuskan, menolak rayuan tersebut:

(1) Mahkamah mempunyai budi bicara sama ada untuk memberikan satu penggantungan prosiding dan merujuk perkara tersebut kepada timbangtara. Dalam erti kata lain, di dalam permohonan yang bersifat begini, mahkamah mempunyai budi bicara mutlak untuk menentukan sama ada untuk menggantung prosiding tersebut atau untuk meneruskannya bagi menyelesaikan tindakan tersebut. Di dalam kes sekarang ini, penolong kanan pendaftar telah menentukan bahawa budi bicara sedemikian hendaklah digunakan bagi menyebelahi plaintif, yakni, beliau telah menolak permohonan defendan untuk satu penggantungan prosiding tersebut dan mahkamah tidak menemui apa-apa yang salah tentang beliau menggunakan budi bicara tersebut (lihat ms 526E–F).

(2) Di dalam kes sekarang ini, terdapat sebab-sebab yang mencukupi untuk menolak penggantungan tersebut. Defendan tidak langsung mempertikaikan bahawa 'sijil lengkap praktikal' tersebut telah dikeluarkan dengan salah. Tambahan pula, defendan tidakpun menggunakan haknya kepada timbangtara di bawah kl 39 kontrak tersebut apabila tuntutan untuk jumlah terhutang tersebut telah dibuat maupun mereka telah menunjukkan bahawa mereka telah sekalipun menjawab surat-surat tuntutan yang dihantar oleh peguamcara yang bertindak bagi pihak plaintif. Tambahan lagi, tiada pertikaian wujud sebelum pemfailan guaman oleh plaintif. Permohonan defendan adalah sama sekali tanpa apa-apa merit. Dakwaan mereka tentang wujudnya pertikaian atau perbezaan sebagaimana yang dinyatakan di dalam afidavit mereka merupakan penegasan yang tidak berasas. Defendan tidak menunjukkan kewujudan apa-apa pertikaian atau perbezaan prima facie yang telah timbul di bawah atau berkaitan dengan kerja-kerja tersebut yang akan jatuh di bawah skop kl 39 dan oleh itu akan merujuk kepada penggunaan s 6 Akta tersebut (lihat ms 527B–D); *Teknik Cekap Sdn Bhd v Nirwana Indah Sdn Bhd* [1996] 4 MLJ 154 diikut.]

Notes

For cases on stay of proceedings, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4279–4282.

Cases referred to

Teknik Cekap Sdn Bhd v Nirwana Indah Sdn Bhd [1996] 4 MLJ 154 (folld)

Legislation referred to

Arbitration Act 1952 s 6

Nor Azmi Ramli (*Maziah Johan* with him) (*Nik Sahgir & Ismail*) for the plaintiff.

Rebecca V Nelson (*Azlina Hashim* with her) (*Teh & Azlina*) for the defendant.

Mohd Ghazali J:. This is an appeal by the defendant against the decision of the learned senior assistant registrar who dismissed the defendant's application to stay all proceedings pursuant to s 6 of the Arbitration Act 1952 ('the Act'). I had, on 23 January 2001, dismissed the appeal with costs and ordered the defendant to file its defence within 14 days from the date of this order. Against this decision, the defendant has appealed to the Court of Appeal.

It is the plaintiff's case that vide three written agreements ('the contract') dated 20 May 1997, respectively entered into between the plaintiff on the one part, and the defendant on the other part, the defendant appointed the plaintiff as the main contractor to carry out mechanical and electrical works, the fixing of a fire protection system and certain 'variation order' works for a proposed ductile iron pipe factory situated on Lot 68, Gebeng Industrial Estate, Mukim Sungei Karang, District of Kuantan, Pahang upon the terms and conditions set out therein ('the said works'). It is the plaintiff's claim that the said works have been carried out, and that upon completion of the said works, a 'certificate of practical completion' had been issued, but notwithstanding that, the defendant has yet to pay them the balance outstanding for works done amounting to RM2,755,690.31, and the return of the retention sum which has been retained by the defendant pursuant to the terms and conditions of the contract amounting to RM432,028.17, totalling RM3,187,718.48 in all ('the said outstanding sum').

Despite letters of demand and reminders, the defendant has refused or failed to make payment. By a letter dated 25 February 1999, the plaintiff's solicitors wrote to the defendant demanding payment of the said outstanding sum, to which the defendant to date has failed, refused and/or neglected to comply with. By this action, which was filed on 13 May 1999, the plaintiff claims the following:

(i) the said sum of RM3,187,718.48;

(ii) interest at the rate of 1.5% per month on the said sum of RM2,755,690.31 from 29 December 1997 till the date of full settlement;

(iii) interest at the rate of 1.5%pa on the said sum of RM432,028.17 from 16 October 1998 till the date of full settlement; and

(iv) costs.

On 24 September 1999, the defendant, with leave of court, entered conditional appearance, and on 8 October 1999, filed this application (encl 9) praying for the following orders:

(a) that the proceedings be stayed pursuant to s 6 of the Act to enable the defendant to refer the dispute to arbitration; A

(b) that if the order prayed for in para (a) above is not granted, the defendant be given leave to file their statement of defence within three weeks from the date of such refusal;

(c) that costs of this application be costs in the cause. B

In its affidavit in support of the application, the defendant pointed out cl 39 of the contract, entitled 'Arbitration', provides that in the event that any dispute or difference should arise between the employer, ie, the defendant or the engineer and the contractor, ie, the plaintiff either during the progress or after the termination or abandonment of the works, as to any matter or C thing of whatsoever nature arising thereunder or in connection therewith, then such dispute or difference shall be referred to the engineer for a decision. The said cl 39, inter alia, reads:

> 39.1 If any dispute or difference shall arise between the employer or the engineer and the contractor (whether during the progress of the works or after the termination, abandonment or breach of this contract) as to: D
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> (a) the construction of this contractor;
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> (b) any matter or thing of whatsoever nature in connection with or arising under this contract; or
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> (c) the withholding by the engineer of any certificate to which the contractor may claim to be entitled E
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> then such dispute or difference shall be referred to the engineer for a decision.
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> 39.2 The engineer's decision, which is to be in writing, shall, subject to sub cl 39.8 (power of the arbitratror), be binding on the parties until the completion of the works, or until the contract shall have been terminated or abandoned, and shall forthwith be given effect to by the contractor who shall proceed with the works with all due diligence, whether or not notice of arbitration is given by him. F
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> 39.3 If the engineer fails to give a decision for a period of eighty four (84) days after being requested to do so by the contractor, or if either the contractor or the employer is dissatisfied with any decision of the engineer, then, in any such case, either the contractor or the employer may, within eighty four (84) days after the expiration of eighty four (84) days, after either of them had made his request to the engineer, or within eighty four (84) days after receiving the decision of the engineer as the case may be, require that such dispute or difference be referred to arbitration, and final decision of a person to be agreed between the parties to act as the arbitrator. G H
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> 39.4 Within eighty four (84) days of a reference being made to arbitration as provided in sub cl 39.3 (reference to arbitration) hereof, or within eighty four (84) days of the earliest commencement date of arbitration, as provided in sub cl 39.7 (arbitration to commence after works completed) hereof, whichever is the later, if the parties have not agreed on an arbitrator, then either party may apply to the President of The Institution of Engineers, Malaysia ('the President') to appoint the arbitrator. I

In its affidavit, the defendant denies that they owe the said outstanding sum as claimed, and counterclaim that it is the plaintiff who owes them money for delay in completion of the said works, failure to carry out the said works, back charges and liquidated assessed damages. They also state that they have been advised by solicitors that these disputes would fall within the contemplation of the said cl 39, and as such should be referred to arbitration.

On 12 May 2000, the learned assistant registrar dismissed the defendant's application, and against that decision, the defendant appealed to the judge in chambers. I had, on 23 January 2001, dismissed the appeal with costs.

The plaintiff claims that the 'certificate of practical completion' has been issued as far as the said works is concerned. As to when that certificate was issued is not clear from the facts as it was never exhibited by either party in their affidavits. Be that as it may, the defendant is not denying that such a certificate has been issued, but despite owing the said outstanding sum claimed, and hence, by this application, seek to invoke the provisions of the said cl 39 of the contract. Clause 39, inter alia, provides in the event that any dispute or difference should arise between the defendant, ie the employer and the plaintiff, ie, the contractor after the completion of the works, as to any matter or thing of whatsoever nature arising thereunder or in connection therewith, then such dispute or difference shall be referred to the engineer for a decision. As discussed earlier, as to when the said works were completed is not clear, as neither party has exhibited the said 'certificate of practical completion'. In claiming the said outstanding sum of RM3,187,718.48, the plaintiff has also claimed interest at the rate of 1.5% per month on the said sum of RM2,755,690.31 from 29 December 1997, till the date of full settlement and interest at the rate of 1.5%pa on the said sum of RM432,028.17, ie the retention sum from 16 October 1998 till the date of full settlement. This would seem to denote that the said works would have been completed before October 1998. This suit was filed on 13 May 1999, but there was nothing to show that prior to that date, the defendant, who claims there are disputes, had ever referred those alleged disputes to the engineer for a decision as provided for under cl 39.1 of the contract. If at all such disputes were referred to the engineer, his decision would, pursuant to cl 39.2 be binding on the parties. Clause 39.3 provides, inter alia, if the plaintiff or defendant is dissatisfied with the decision of the engineer, either party may require that such dispute or difference be referred to arbitration and the final decision of a person to be agreed between the parties to act as the arbitrator. On the facts, no such thing seem to have happened.

As discussed earlier, the plaintiff denied that they owed the outstanding sum as claimed, and in reply claimed that the plaintiff owed them money for delay in completion of the said works, failure to carry out the said works, back charges and liquidated assessed damages. The defendant has not, however, illustrated further what these disputes were, neither have they specified the sum allegedly owed by the plaintiff to them. They also did not

dispute that the 'certificate of practical completion' has been issued for the said works. If at all those alleged disputes did exist prior to the filing of the claim by the plaintiff, I would have expected the defendant to exercise its right under the said cl 39 and refer the alleged disputes to the engineer for his decision.

At the appeal before me, counsel for the defendant argued that pursuant to the said cl 39, it is the duty of the plaintiff to refer any dispute to the engineer. I cannot fathom that argument. Where such an obligation exists in the said cl 39 escapes me. To me, what the plaintiff is complaining about in this case is that the defendant has failed to make the outstanding payment that is due to them for work done. It is basically a claim of a monetary nature.

Section 6 of the Act entitled 'power to stay proceedings where there is submission to arbitration' reads:

> If any party to an arbitration agreement or any person claiming through or under him commences any, legal proceedings against any other party to the arbitration, or any person claiming through or under him, in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, before taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration may make an order staying the proceedings.

What is clear from the above provision is that the court has a discretion whether to grant a stay of proceedings and refer the matter to arbitration. In other words, in applications of this nature, the court has the ultimate discretion to determine whether to stay the proceedings, or to proceed to dispose of the action. In the instant case, the learned senior assistant registrar has determined that such discretion should be exercised in favour of the plaintiff, viz, she dismissed the defendant's application for a stay of the proceedings, and I find nothing erroneous about her exercise of that discretion. In *Teknik Cekap Sdn Bhd v Nirwana Indah Sdn Bhd* [1996] 4 MLJ 154, Abu Samah JC (as he was then) said (at p 160):

> Before a stay of further proceedings can be granted under s 6 of the Act, three conditions must be satisfied. Firstly, there must be a 'dispute' which falls within the terms of the arbitration agreement in question. This will rule out cases where what is in dispute is the very existence of either the contract itself or the arbitration clause for it is not for an arbitrator to determine the existence or extent of his or her own jurisdiction (see *Heyman v Darwins Ltd* [1942] AC 356); it will also rule out cases in which the plaintiff's claim is indisputable, notwithstanding the provision of an arbitration clause (see *Ellis Mechanical Services Ltd v Wales Construction Ltd* [1976] 2 BLR 57; 120 SLJ 167).
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> Secondly, the defendant must apply to the court for a stay of proceedings before taking any other steps in the proceedings (see *Seloga Jaya Sdn Bhd v Pembenaan Kent Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97).

Thirdly, it is dependent upon proof that the defendant is ready and willing to do all things necessary to the proper conduct of the arbitration (see *Seloga Jaya Sdn Bhd*).

If all the above conditions are satisfied, the onus switches to the plaintiff to convince the court that there is sufficient reason why the matte should not be referred to arbitration.

In the instant case, I am of the view that there are sufficient reasons for refusing the stay. The defendant has not exhibited any material which could assist them in their application to stay these proceedings pursuant to s 6 of the Act. The defendant has not even disputed that the 'certificate of practical completion' has been issued erroneously. Further, the defendant does not seem to have exercised its right to arbitration under the said cl 39 when the demand for the outstanding sum owing was made, neither have they shown that they have ever responded to the letters of demand sent by solicitors acting for the plaintiff. It is strange that the defendant is now alleging the existence of disputes when none seemed to exist prior to the filing of the suit by the plaintiff. It is my view that the defendant's application is totally without any merits. Their allegations of the existence of disputes or differences as stated in their affidavit, to me, are bare averments. They have not shown the existence of any prima facie dispute or difference that has arisen under or in connection to the said works which would fall within the purview of the said cl 39, and hence would invoke the operation of s 6 of the Act.

Under cl 1.1(d) of the contract, it is provided that the word 'engineer' found in the contracts means 'the person appointed by the employer to act as engineer for the purposes of the contract and designated as such in the appendix'. What is clear to me is that this would mean that the engineer is appointed by the defendant and not the plaintiff. The terms and conditions found in the contract would denote that it is the engineer who has control and supervision of the works, including the issuance of certificates. Despite the issuance of the 'certificate of practical completion', there was no instance of a complaint that that certificate was defective, not in compliance with the provisions of the contract or in any manner incorrect. Since such a certificate would have been issued by the engineer, and if he was not satisfied with the said works, surely the said certificate would not have been issued in the first place. That certificate would denote that the engineer must have been satisfied that the said works have been completed. It is indeed strange that the engineer himself does not seem to have raised any complaints. The engineer is an independent professional. I would not think that he would cause the issue of the said certificate if the said works had not been carried out to his satisfaction pursuant to the terms of the contract. The facts before me would seem to suggest that the defendant had ample opportunities of resorting to the said cl 39, but this was never done until legal proceedings were afoot. Even stranger still, no evidence has been tendered by the defendant that any of these complaints have been brought to the notice of the plaintiff.

On the whole, I am satisfied that the plaintiff, in opposing the stay, has discharged the onus which was on them. They have forwarded sufficient

reasons for the court to exercise its discretion in refusing a stay, and that being the case, I dismissed this appeal with costs and ordered the defendant to file their statement of defence within 14 days from the date of my order.

Appeal dismissed.

Reported by Wong Siok Chin